## APPENDIX A

SUPREME COURT OF NEW JERSEY
C-732 September Term 1998
47,210

IN THE MATTER OF THE APPLICATION OF DIANE SANK TO CONTEST THE ELECTION OF ILAN PLAWKER TO THE OFFICE OF COUNCILPERSON OF THE BOROUGH OF ENGLEWOOD CLIFFS

ON PETITION FOR CERTIFICATION

(DIANE SANK - Petitioner)

(Stamp)
FILED FEB 24, 1999
/s/ Stephen W. Townsend
CLERK

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-3456-95 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 23rd day of February, 1999.

/s/ Stephen W. Townsend
CLERK OF THE
SUPREME COURT

(Stamp)
I hereby certify that the foregoing is a true copy of the original on file in my office.
/s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT OF NEW JERSEY

(Stamp)
/s/ Stephen W. Townsend
CLERK OF THE
SUPREME COURT

## APPENDIX B

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3456-95T3F

IN THE MATTER OF THE APPLICATION OF DIANE SANK TO CONTEST THE ELECTION OF ILAN PLAWKER TO THE OFFICE OF COUNCILPERSON OF THE BOROUGH OF ENGLEWOOD CLIFFS

(Stamp)
FILING DATE
APPELLATE DIVISION
DEC 7, 1998
/s/ Emille R. Cox
CLERK

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Submitted November 10, 1998--Decided (Stamp) DEC 7, 1998

Before Judges Muir, Jr., and Keefe.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County.

Diane Sank, appellant, filed a *pro se* brief.

Peter Verniero, Attorney General of New Jersey, attorney for respondents Bergen County Superintendent of Elections and Bergen County Board of Elections (Andrea M. Silkowitz, Assistant Attorney General, of counsel; Susan C. Berger, Deputy Attorney General, on the brief).

Oury & Mizdol, attorneys for respondent Ilan Plawker (Dennis J. Oury, of counsel and on the brief).

PER CURIAM

Plaintiff, Diane Sank, appeals from her unsuccessful

contest of the election for a seat on the Borough Council of Englewood Cliffs (Council), the term for which commenced on January 1, 1996, and is to end on January 1, 1999. She received the third highest number of votes, and contested the election of Ilan Plawker, who received the second highest number, eight more than plaintiff. Plaintiff sought either that the election be set [p. 2] aside, or that she be declared the winner of the second Council seat.

Plaintiff alleged in her complaint that certain absentee ballots were defective (count one); certain non-residents were permitted to vote, either at the polls or as absentee (count two); confusion caused by a new type of voting machine caused voters to flee (count three); Plawker and his political allies conspired to alter the absentee ballot process (count four); and Board workers failed to follow correct procedures in issuing and recording voting authorities (count five).

The matter was tried before Judge Troast in seven days between January 2 and 12, 1996. The judge found that three votes were invalid based on non-residence of the voters. After two of those voters testified that they voted for Plawker and not Sank, the court reduced Plawker's tally by two. After the third voter testified that he voted for both Plawker and Sank, the judge reduced both tallies by one, leaving a six-vote lead for Plawker.

The judge refused to set aside the election on the ground that the new machines caused voter confusion. He found that, although there was an eight-vote discrepancy between the number of authorities to vote and the number of votes reported on the machines, the level of error was not unusual and did not indicate an unfair result. In arriving at that conclusion, the judge accepted the testimony of Superintendent Eileen Feldner who testified that it was not unusual, with any machine, for a voter to flee, that is, to sign in and receive a voting authority

slip [p. 3] but leave without actually voting. Board workers were instructed to void the voting authority slip used for that voter if they saw this happen. Feldner testified, based on her five years of experience as Superintendent and previous twelve years of experience as a Commissioner on the Board, that when voter authority slips exceeded the machine tally, it was because some voters had walked out without voting or failed to follow directions to register the vote.

After considering the testimony concerning challenged individuals (mostly absentee) voters, the judge invalidated two of the votes probably cast for Plawker, but concluded that there was an insufficient basis to set aside enough additional votes to change the result of the election.

During the course of the trial, Judge Troast refused to accept the testimony of plaintiff's handwriting expert, Patricia Siegel. At the time Judge Troast made that decision, Siegel's testimony, based upon the report that she issued, placed only five votes in question. Judge Troast determined that such testimony would be irrelevant because Plawker then maintained a lead of six votes in the tally.

On the last day of trial, plaintiff's counsel named seven voters whose votes were still at issue. He admitted, however, that he was not "read to go forward with those at this time" because witnesses necessary to challenge those votes were not "made available to [him]." Thus, he was unable to call any witnesses. Judge Troast declared an end to the proceedings [p. 4] stating, "I can't speculate as to what the plaintiff might be able to produce if she was given unlimited time."

During the course of the trial, Judge Troast also granted plaintiff's counsel's request to be relieved from arguing the conspiracy theory which counsel believed lack a good faith basis. Plaintiff's counsel explained that he wanted to argue only that certain ballots had technical defects without

attempting to prove a conspiracy. Plaintiff herself declined to testify on that issue or to make a proffer of proof. Indeed, plaintiff abandoned the conspiracy allegations and later moved to dismiss count four of her complaint. She explained in a letter to the court that she agreed with the court that *pro se* representation on the issue would be unwise. Accordingly, the court dismissed the conspiracy count of the complaint.

Both before and during trial, Judge Troast declined to grant adjournments and continuances because the matter was an election case and by necessity should "proceed as expeditiously as possible." His ruling was made, undoubtedly, in light of the requirements of *N.J.S.A.* 19:29-4, *N.J.S.A.* 19:29-5 and case law on the subject. See *In re Smock*, 5 *N.J. Super.* 495, 504 (Law Div. 1949). Notably, the trial of this case was not concluded until more than two months after the November 7, 1995, election and more than two weeks after January 3, 1996, when the new Council members took office.

On appeal plaintiff presents the following issues which we have reworded. [p. 5]

I. WHETHER THE COURT ERRED BY EXCLUDING THE TESTIMONY OF THE HANDWRITING EXPERT?

II. WHETHER THE COURT ERRED BY FINDING THAT THE EXPERT'S REPORT CAST INTO QUESTION FIVE, INSTEAD OF SIX, SIGNATURES?

III. WHETHER THE COURT ERRED BY ENDING THE TRIAL ABRUPTLY AND PREMATURELY?

IV. WHETHER THE COURT ERRED BY DENYING PLAINTIFF'S RIGHT TO PROCEED PRO SE WHEN HER ATTORNEY SOUGHT TO BE RELIEVED AS COUNSEL?

V. WHETHER THE COURT ERRED BY FORCING PLAINTIFF TO PROCEED PRO SE ON THE CONSPIRACY PORTION OF THE TRIAL?

VI. WHETHER THE COURT ERRED BY ALLOWING PLAWKER'S ATTORNEY TO THREATEN HER?

VII. WHETHER THE COURT ERRED BY DENYING PLAINTIFF'S MOTION TO ADJOURN?

VII. WHETHER THE COURT ERRED BY REMAINING IN SESSION IN THE AFTERMATH OF A SEVERE SNOW STORM?

IX. WHETHER THE COURT ERRED BY PREVENTING HER SON FROM SERVING SUBPOENAS?

X. WHETHER THE COURT ERRED BY FAILING TO FIND THAT CONFUSION AT THE VOTING MACHINES REQUIRED REVERSAL OF THE ELECTION RESULTS?

XI. WHETHER THE COURT ERRED BY LETTING STAND MESSINGER'S VOTE, DESPITE HER TWO VOTING ATTEMPTS?

XII. WHETHER THE COURT ERRED BY LETTING STAND SCHERL'S VOTE, DESPITE A DEFECT IN HER APPLICATION FOR ABSENTEE BALLOT?

XIII. WHETHER THE COURT ERRED BY FINDING CREDIBLE SLATER'S TESTIMONY THAT HE VOTED FOR BOTH PLAWKER AND PETITIONER?

[p. 6] Issues six, nine, and eleven are raised for the first time on appeal.[1] An appellate court will not consider

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[1] The fact that Judge Troast struck the issue of whether plaintiff's son could be appointed "Special Process Servicer" from the Order Fixing Date for Hearing, filed on December 8, 1995, does not constitute an adjudication on the merits, but

questions or issues not presented to the trial court unless those issues "go to the jurisdiction of the trial court or concern matters of great public interest." *Nieder v. Royal Indemnity Ins. Co.*, 62 *N.J.* 229, 234 (1973). None of the exceptions to the general rule appear in this case. Accordingly, we will not consider the merits of issues six, nine, or eleven.

As to the remaining issues, our review of the record satisfies us that after giving deference to Judge Troast's ability to assess the credibility of the witnesses, the judge's findings of fact and conclusions of law are amply supported by the credible evidence. *Rova Farms Resort, Inc. v. Investors Ins. Co.*, 65 *N.J.* 474, 484 (1974). Therefore, none of the issues presented by plaintiff on appeal warrant our intervention or require additional discussion. *R.* 2:11-3(e)(1)(A) and (E). The judgment under review is affirmed substantially for the reasons stated by Judge Troast on the record.

Affirmed.

(Stamp)
I hereby certify that the foregoing is a true copy of the original on file in my office.

/s/ Emeille R. Cox
CLERK

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simply an indication that the judge believed that it was not an appropriate issue to address on the appearance date of December 20, 1995. Plaintiff never sought an explanation from the judge, on the record, as to the merits of the request.

**APPENDIX C**

OURY & MIZDOL, P.C.
411 Hackensack Avenue
Hackensack, New Jersey 07601
Attorneys for Respondent

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY
DOCKET NO: L-11960-95

| | |
|---|---|
| IN THE MATTER OF THE APPLICATION OF DIANE SANK TO CONTEST THE THE [sic] ELECTION OF ILAN PLAWKER TO THE OFFICE OF COUNCILPERSON OF THE BOROUGH OF ENGLEWOOD CLIFFS PURSUANT TO N.J.S.A. 19:29-1, ET. SEQ. | CIVIL ACTION<br><br>CONSENT JUDGMENT |
| Plaintiff | |

THIS MATTER having been tried before the Court by and in the presence of Stanley L. Morrow, Esq., attorney for plaintiff, Diane Sank, Susan Berger, Esq., Deputy Attorney General, appearing on behalf of the Bergen County Board of Elections, and Superintendent of Elections, and Dennis J. Oury, Esq., appearing on behalf of the Respondent, Ilan Plawker, and the Court having heard the testimony and argument of counsel, and having made findings of fact and conclusions of law as more fully set forth on the record, and good cause having been shown:

IT IS on this 18th day of January, 1996;

[p.2] ORDERED and ADJUDGED, that Judgment be and the same hereby is entered in favor of respondent, Ilan Plawker and against the plaintiff, Diane Sank and that the

election for the office of council in the Borough of Englewood Cliffs held on November 7, 1995 in which Ilan Plawker was elected be and the same hereby is confirmed.

/s/ Arthur L. Troast
Honorable Arthur L. Troast, J.S.C.

I hereby consent to the form
and entry of the within Judgment.

[2]
Stanley L. Morrow, Esq.

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[2] Petitioner instructed her attorney, Stanley L. Morrow not to sign the Consent Judgment.

**APPENDIX D**

SUPERIOR COURT OF NEW JERSEY
CIVIL DIVISION -- BERGEN COUNTY
DOCKET NO. L-11960-95
APPEAL NO. A-

IN RE 1995 GENERAL ELECTION FOR THE OFFICE OF COUNCIL IN THE BOROUGH OF ENGLEWOOD CLIFFS, COUNTY OF BERGEN

TRIAL
(transcript)

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Place: Bergen County Courthouse
Hackensack, New Jersey
Date: January 12, 1996

BEFORE

HON. JUDGE ARTHUR L. TROAST, J.S.C.

ORDERED BY:

Dr. Diane Sank
173 Charlotte Place
Englewood Cliffs, New Jersey 07632
Tel No. 201-567-7297

APPEARANCES:

STANLEY MORROW, ESQ.
Attorney for Diane Sank.

SUSAN BERGER, ESQ. Deputy Attorney General
Attorney for Bergen County Board of Elections and
Bergen County Superintendent of Elections

DENNIS OURY, ESQ.
Attorney for Ilan Plawker

Reported by: Kathleen Dabrowski, C.S.R.
Official Court Reporter
Bergen County Courthouse
Hackensack, New Jersey 07601

Colloquy

[p. 37] THE COURT: All right. In this case the plaintiff seeks to set aside the election generally on the basis that the electronic machines which were used at the last election November 7th, 1995 caused problems, and in particular alleges that since there is a discrepancy of eight between the number of authorities to vote and the number of votes on the machine, that the Court should set aside the election. This, of course, is a particular basis upon which the plaintiff seeks to set aside the election. The lawsuit and the trial, of course, involve other issues as well. [p. 38]

In this case there was testimony with regard to the operation of the new machines. The Court heard the testimony of the Superintendent of Elections with regard to the selection of new machines and the use of new machines in Englewood Cliffs as well as in other municipalities. They were valid reason for using new machines, new and different machines instead of the old machines which had been used for elections.

I have heard and observed the witnesses who testified as to what happened in Englewood Cliffs in connection with the use of the new machines. Obviously when there is a change things don't work the same way they worked before the change. However, in my opinion the plaintiff had not established sufficient basis to vacate or set aside this election because of the use an operation of the new electronic machines in Englewood Cliffs at the time of the election in question. The proofs indicate that the new voting machines were operating at the time of the election in Englewood Cliffs. The proofs indicate that any voter who went the polls had an opportunity to vote on the new machines. The proofs indicate that there were instructions and directions and assistance was available for anyone who wanted assistance in connection with the use of the new machines. The Court finds there was

no breakdown of the machines. The Court finds that the machines operated properly at the time of the election. The Court also finds that the plaintiff has failed to establish that the [p. 39] Superintendent of the Elections or any voting officials failed to properly install and make the machines available at the time of the election in Englewood Cliffs.

Admittedly there was a discrepancy between the authorities and the votes reported on the machines. We never have a perfect election. The Court finds that there was probably no greater discrepancy in connection with the use of the new machines than there were with the old machines in Englewood Cliffs.

In short, this is not a case where the plaintiff has brought in voters who contend that they were unable to vote at the time of the election. This is not a case where the machines broke down at the time of the election.

The Court took into account the testimony of the individuals who testified to the election in Englewood Cliffs and I fail to find any sound basis for setting aside the election because of the use of the new electronic voting machines at the time of that election. The plaintiff had a burden here to demonstrate that there were illegal votes cast at the election which would have changed the result of the election. This is an election where defendant Plawker received 1,009 votes and plaintiff Sank received 1,001 votes. The Court did invalidate two of the votes which were probably cast for Plawker. However, the Court concludes that there isn't sufficient basis to set aside sufficient number of votes in [p. 40] addition to the two votes that were held invalid to change the results of this election.

I have taken into account that the plaintiff has retained a handwriting expert and that the handwriting expert would testify as to certain signatures and that it's possible that there

would be five votes changed in the tally at the time of the recount. However, those five possible changes plus the two changes that the Court determined based upon invalid ballots are insufficient to change the result of this election.

The Court heard the proofs in this case. The Court, of course, had authority to determine what the facts are and structure a remedy. Under the law the plaintiff was entitled to a remedy. This is not a case where the plaintiff has proved that there was fraud at the time of the election. This is a case where the plaintiff originally alleged a conspiracy but has withdrawn the conspiracy charge. Unfortunately, plaintiff, Dr. Sank, has limited financial means to finance the election contest. She was furnished with assistance by able counsel, Mr. Morrow. Mr. Morrow presented her case. Dr. Sank was there at Mr. Morrow's side, the two of them presented what proofs were available, and they represented to the Court what else might be available. However, I have decided that it is appropriate for the Court to give a decision today. I can't speculate as to what the plaintiff might be able to produce if [p. 41] she was given unlimited time. In my opinion the proofs presented to the Court at this trial are insufficient for the Court to change the result of the election insofar as the parties in this case are concerned. My opinion, the proofs are insufficient for the Court to order a new election for any reason in this case. Accordingly, I am going to dismiss the complaint in the case.

Anything else to be decided counsel?

MS. BERGER: Not at this point, Judge. Thank you very much. I will submit an Order.

MR. MORROW: Thank you, your Honor.

THE OFFICER: Judge, shall I return the evidence?

THE COURT: I believe the evidence should be returned to counsel. The record will so indicate.

(Court is adjourned at 11:45.)

CERTIFICATION

I, Kathleen Dabrowski, C.S.R., license number XI 00539, an Official Court Reporter, in and for the State of New Jersey, do hereby certify the foregoing to be prepared in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of my stenographic notes takes in the above matter to the best of my knowledge and ability.

/s/ Kathleen Dabrowski
Katnleen Dabrowski, C.S.R.
Official Court Reporter
Bergen County Courthouse
Hackensack, New Jersey 07601

Date: 3/12/96

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4832-97T3

IN THE MATTER OF CANDIDATES
TO NEW JERSEY GENERAL ASSEMBLY

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Argued August 11, 1998 -- Decided SEP 2, 1998

Before Judges Long, Carchman and Steinberg.

On appeal from Superior Court of New Jersey, Law Division, Burlington County.

Anthony T. Drollas argued the cause for appellant (Capehart & Scatchard, attorneys; Mr. Drollas, on the brief.)

John P. Harrington argued the cause for respondents (Barry & McMoran, attorneys; Mr. Harrington on the brief.)

Peter Verniero, Attorney General, attorney for the State of New Jersey (Francine W. Kaplan, Deputy Attorney General, on the brief.)

PER CURIAM

This appeal centers on the meaning of N.J.S.A. 19:29-1(e) which provides that voters may contest a nomination or election "when illegal votes have been received, or legal votes rejected at the polls sufficient to change the result." At issue is whether the mere existence of unrecorded legal votes in a number exceeding the margin of victory is enough to set aside the election results. We think it is.

[p. 2] The case arose out of a contest for two Assembly

seats in the Seventh Legislative District which includes various portions of Burlington and Camden Counties. The facts are not in dispute. An election took place on November 4, 1997 in which Democratic candidates, Herb Conaway and Jack Conners, and Republican candidates, Kenneth Faulkner and George Williams, vied for the two seats. The original election results showed Conaway and Faulkner as the winners. However, Conaway and Conners petitioned the Superior Court, pursuant to *N.J.S.A.* 19:29-2, for a recount of all paper ballots and a recheck of the voting machines. A recount and recheck was held and as a result, Conners was declared the winner over Faulkner. The actual tally was as follows:

Conaway - 27457
Conners - 27409
Faulkner - 27335
Williams - 25214

A certificate of election was issued to Conaway and Conners who have since been sworn into the Assembly representing the Seventh Legislative District.

On December 3, 1997, Faulkner and Williams filed a Verified Petition in the Superior Court, Law Division, challenging the outcome of the election.[3] As a result of a further recheck of certain voting machines ordered by the trial judge, it was determined that voting machine #19003 in the

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[3] Actually, they filed two petitions with the Clerk of the Superior Court, Law Division, one in Burlington and one in Camden County. This dual filing was required by the geographic overlap of the Seventh Legislative District between portions of Burlington and Camden counties. The matter was ultimately heard by a Burlington County Superior Court Judge.

32nd local election [p. 3] district of Willingboro had malfunctioned and failed to record all of the votes cast. The machine recorded only 93 votes from a total of 275 persons who entered the voting booth. Experts for both sides agreed that if 275 persons entered the voting booth, there is a statistical expectation of fall-off of between 8% and 13% in terms of the number of votes cast in the assembly race. In other words, Faulkner's expert opined that 253 assembly votes were cast, thus establishing the number of unrecorded votes at between 130 and 160. It is not necessary to resolve which of these numbers is correct because both exceed the margin of victory of 74 votes which separated Conners and Faulkner.

On February 9, 1998, Faulkner and Williams[4] filed a Motion for Judgment Setting Aside the Election pursuant to *N.J.S.A.* 19:29-9. The judge scheduled a hearing with respect to the Motion. In the interim, the judge obtained from the Burlington County Superintendent of Elections copies of the results of general elections held within the Township of Willingboro during the years 1992-1997. By letter, the judge requested that the parties submit legal arguments with respect to the propriety of taking judicial notice of those election returns for the purpose of predicting how the missing votes

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[4] [p. 4] During the hearing on the motion to set the election aside, the judge determined that the movants had proven that the subject voting machine had malfunctioned, and that a number of votes had not been recorded by the machine in an amount greater than Conners' 74 vote victory margin. Those findings are not contested here. According to the movants, that should have been the end of the inquiry. Because the number of unrecorded votes exceeded the victory margin and because it could not be ascertained with certainty how these votes were cast, they argued that a new election was required.

were cast. Faulkner and Williams objected to the taking of judicial notice of historical election returns.

The judge disagreed. Citing *In Re Application of Abbott Low Moffat*, 142 *N.J. Super.* (App. Div. 1976), he concluded that the issue in a case like this is not simply whether the total of the unrecorded votes exceeds the victory margin. Rather, he viewed his role as requiring an assessment of how these votes would have been cast. To do this he looked at the voting pattern in District 32 from 2992 to 1997:

> We first start with the proposition that the registration in this district is nearly four to one in favor of the Democrats. Now it is also true, and to be perfectly fair about it, I should mention that there is also a substantial number of undeclared voters in this district. But, the specific registration as between Democrats and Republicans show approximately a four-to-one registration.
>
> To review the years which I reviewed, demonstrates even more strongly, in my view, the voting pattern in this particular Willingboro district. In 1992, for instance, when Clinton and Bush were at the top of the ticket, Clinton polled 239 votes and Bush polled 73 votes, In the race for the Congressional seat, Mr. Ryan polled 178 votes, [p. 5] Mr. Saxton polled only 134 votes. And, of course, he ultimately prevailed. In the race for Sheriff, Mr. Phillips polled 169 votes, whereas the ultimate winner, Mr. Cummings, only polled 111 votes. In the race for Freeholder. Mr. Fellner polled 200 votes, Mr. Farias polled only 99 votes in this particular district.
>
> In 1993 with Florio and Whitman at the head of the ticket, Florio polled 152, Whitman 78. In the race for State Senator in the 7th District in that year, Casey won by 113 to 98. And, significantly enough, in the Assembly race for that year, Anderson and

Sosa, the Republicans, lost to Petrillo and Williams by 107 votes or 103 votes for Sosa to 119 votes. That election or that contest is actually the closest one in Republican -- in the annals of election. But there again, the winners district wide in that particular election lost in the 32nd district.

In 1994 with Lautenberg and Haytaian at the top of the ticket, Saxton once again lost in District 32 by a vote of 106-85. And, Mr. Conda, the County Clerk, although a winner county wide lost in this district by a vote of 140 to 51.

In 1995, with the Assembly race once again at issue, Diane Allen and Carmine DeSopo lost District 32 by a combined total vote of 114 where their adversaries, Dugan and Leisure, won by 173.

In 1996, with again Clinton and this time Dole at the head of the ticket, Clinton beats Dole in this district by 261 versus 56. Saxton, for the third straight time in this particular district, loses by 104 to 164. And Surrogate Conda lost in this district by a vote of 202 to 84.

In addition, of course, to all of that, and I recognize that the parties question from the get-go the accuracy of the machine in District 32, but the fact of the matter is that the machine did count, in this case, in 1997 some 31 votes for the Republicans versus some 68 or so votes for the Democrats; an [p. 6] almost two-to-one showing on those results from this machine that we do have.

In short, not a single Republican candidate for any office, State or Federal, has ever prevailed in District 32 in the last five general elections, and this includes some very, very well-known Republican politicians in the county, such as James Saxton, Elton Conda, Mike Conda, Diane Allen and Carmine Deice, all of whom ultimately prevailed in their respective elections, but failed to prevail in District 32.

> The bottom line of this analysis, based upon these public and highly trustworthy records, is for the court that with reasonable certainty Mr. Faulkner could not have made up his loss out of District 32. If he couldn't, certainly neither could Mr. Williams.
>
> Accordingly, in my view, the petitioners simply have not been able to offer any proof that the 160 votes that they count as unrecorded would have been cast in such a way as to reverse the results of this particular election. For those reasons, the respondents' motion to dismiss this case is granted and the petitioners' motion to overturn the election and to be followed by some remedy hereafter set forth is respectfully denied. The election of Mr. Conaway and Mr. Conners stand.
>
> I do not see this result as a defeat or a perversion of the popular will, but a vindication of it. Remember, this decision does not add one single vote to the totals of any of these four candidates. It merely rules that an entire 7th District election involving the casting of over 100,000 vote for two of the 7th District Assembly seats cannot be affected or set aside based upon 160 unrecorded votes in a District which would have with reasonable certainty favored the declared winners.

Faulkner and Williams appeal, contending that the judge erred in taking judicial notice of the other election returns and in refusing to order a new election once he ascertained that the [p. 7] unrecorded votes exceeded the victory margin. While we agree with the trial judge that prior election returns are, in general, proper subjects of judicial notice under *N.J.R.E.* 201(b)(3), it is in connection with his use of those records in this case that we part company from him and reverse.

We now begin our analysis with the statute. In order to successfully contest election results under *N.J.S.A.* 19:29-1(e), a contestant must prove either that "illegal votes have

been received, or legal votes rejected at the polls sufficient to change the result." When illegal votes are the issue

> the contestant has not only the burden of showing that illegal votes were cast in number sufficient to change the result if they had in fact been cast for the contestee, but also the burden of showing, to the extend possible under the circumstances, for whom the illegal votes were cast. *[Application of James T. Murphy, 101 N.J. Super.* 163, 167 (App. Div.), certif. denied, 52 N.J. 172 (1968).]

However, as we indicated in Moffat, supra,

> the burden of showing specifically for whom votes were cast, while pertinent in cases of illegality, has no place where the issue is the rejection of legal votes. Cf. *In re Fifteen Registered Voters, Sussex Cty.*, 129 *N.J. Super.* 296 (App. Div. 1974), certif. den. 65 N.J. 577 (1974).[142 *N.J. Super.* at 224.]

More particularly, where legal votes have been rejected, the standard is as follows:

> the contestant's burden would be met by a demonstration that had the votes been cast for him, the result would have been different. This, we believe, is the import of the phrase [p. 8] "sufficient to change the result," contained in *N.J.S.A.* 19:29-1(e). [Id.]

In other words, once the number of unrecorded legal votes is established, all that is required is for the judge to determine whether it exceeds the margin of victory. If so, the movant, has proved his or her case.

Where the trial judge went wrong, we think, is in his reading of Moffat. He concluded that under Moffat, in a case

involving unrecorded legal votes, the movant's burden is not only to show that the number of unrecorded votes exceeds the margin of victory but also that it is highly probable that the unrecorded votes would have been cast for the challenger, thus affecting the outcome. We disagree. In Moffat, only one vote was recorded for Abbot Low Moffat. However, at a hearing, five persons were produced who testified that they had voted for him. This proved that the voting machine malfunctioned and that some votes went unrecorded. Unlike this case, however, no expert testimony was adduced in Moffat to project how many votes were not recorded. We observed:

> It is known that 143 persons used the machine in question. With two members of the local governing body to be elected, there were 286 potential votes. Yet, only 143 were recorded for the four candidates, so that 138 cannot be accounted for. Of course, it does not follow that every voter cast his or her ballot for both positions, and, indeed, some may have voted for neither. Nevertheless, comparing the number of votes cast for Barbara Lependorf with the much smaller totals for the two Republican candidates, and taking into account the glaring disparity between the 100 votes for Ms. Lependorf and the solitary vote for her running mate, there is a compelling [p. 9] inference that a substantial number of votes for Moffat were not recorded. Since only 92 votes separated Peyton and Moffat, the latter would have emerged the victor if he had received, as seems likely, at least as many votes as the other Democratic candidate. [142 *N.J. Super.* at 225-26.]

While at first blush this language may appear to support the trial judge in this case, upon closer review, in the context of the facts in Moffat, it is clear that its purpose was only to

establish the probable number of legal votes which went unrecorded and not to assess how those votes might have been cast. In other words, by our analysis, we supplied that element which the experts established in this case: the unlikely number of unrecorded legal votes. In so doing, it was clearly not our purpose to determine how such votes were cat because, as we said, such an analysis "has no place where the issue is the rejection of legal votes." 142 *N.J. Super.* at 224. Rather, our sole purpose was to determine the probable number of unrecorded legal votes. That this is the correct reading of Moffat flows inexorably from our language which bears repeating: "the contestant's burden would be met by a demonstration that had the votes been cast for him the result would have been different." 142 *N.J. Super.* at 224 (emphasis added). Here it is uncontroverted that Faulkner met his burden by showing that between 130 to 160 iegal votes went unrecorded. If cast for Faulkner, 130 votes would have altered the outcome. That is all he was required to show.

That said, we are unable to ascertain who, as between Conners and Faulkner, won the second seat in the Seventh Legislative [p. 10] District election of November 4, 1997. Thus, in accordance with the provisions of *N.J.S.A.* 19:29-9, a judgment should be entered against Conners, his certificate of election annulled, and the election results set aside. This creates a vacancy in the Seventh Legislative District "otherwise than by expiration of a term," the filling of which is governed by *N.J. Const.* art. IV § 4, ¶ 1 and *N.J.S.A.* 19:27-11.1. According to the Constitution and relevant statute, the unexpired term shall be filled at the next general election which is now scheduled for November 3, 1998. [5]

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[5] In *In Re Maple Shade General Election, 203 N.J. Super.* 563 (Law Div. 1985) a special election was ordered as a remedy for an election similarly compromised by a

*Ibid.* Because the primary preceding the general election has passed, under *N.J.S.A.* 19:27-11.1, the representatives of each political party shall select the nominees according to the provisions of 19:13-20a(3).[6] In the interim, the vacancy shall be filled by the members of the county committee of the political [p. 11] [p.11] party of which the prior incumbent was the nominee, from the units which comprise the legislative district. *N.J. Const.* art IV, §4, ¶1. Obviously, in view of the new slate of candidates, voters in the entire Seventh Legislative District shall elect the person to fill the vacant seat.

Reversed and remanded for the entry of judgment consonant with the principles to which we have adverted.

I hereby certify that the foregoing is a true copy of the original on file in my office.
/s/ Emille R. Cox
Clerk

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malfunctioning voting machine in one district. However, *Maple Shade* was decided prior to the 1988 amendments to *N.J. Const.* art. IV, §4, ¶1 and N.J.S.A. 19:27-11 which deleted the option of holding a special election in order to fill a vacancy occurring in the legislature. The current provisions relating to filling vacancies in the Legislature contained in the Constitution and in *N.J.S.A.* 19:27-11.1 mandate that a vacancy occurring "otherwise than by expiration of a term" shall be filled "only at the next general election."

[6] *N.J.S.A.* 19:13-20a(3) requires that:

> In the case of an office to be filled by the voters of a portion of the State comprising all or part of two or more counties, the candidate shall be selected by those members of the county committee of the party wherein the vacancy has occurred who represent those portions of the respective counties which are comprised in the district from which the candidate is to be elected.

# APPENDIX F

**PATRICIA SIEGEL ENTERPRISES, INC.**
**HANDWRITING EXAMINATION**
**23 SOUTH DRIVE**
**GREAT NECK, NEW YORK 11021**

**(516) 487-5287**

(Stamp)
RECEIVED AND FILED
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Carol J. Rauety
DEPUTY CLERK
SUPERIOR COURT

REPORT FOR

January 11, 1996

Dr. Diane Sank
173 Charlotte Place
Englewood Cliffs, New Jersey 07632

Re: Superior Court of New Jersey Law Division:
Bergen County, Docket No: L-11960-95
Handwriting identification, councilperson election,
Englewood Cliffs, N.J.

QUESTION

Do the signatures/handwriting on the Certificate of Civilian Absentee Voter (Certificate) and Civilian Absentee Ballot Application (Ballot Application) forms represent the genuine writing of the following voters: Stephanie Zola, Anna Clemente, Maddalena Clemente, Vinny Clemente and Donato Clemente?

COMPARISON MATERIALS

Certificates and Certificate Envelopes: Original documents regarding Stephanie Zola, Anna Clemente, Maddalena Clemente, Vinny Clemente and Donato Clemente.

Ballot Applications, front and back: Original applications regarding Stephanie Zola, Anna Clemente, Maddalena Clemente, Vinny Clemente and Donato Clemente.
Permanent Registration/Registration Application forms: Original forms regarding Stephanie Zola, Gregory Zola, Penni Zola, Ralph Zola, Maddalena Clemente, Vinny Clemente, Donato Clemente, and a photocopy of Anna Clemente's Registration form.
Signature Comparison Records: Original records regarding Anna Clemente, Donato Clemente, Gregory Zola, Penni Zola and Ralph Zola.
Request exemplars obtained in Court 1/10/96: Signatures and limited writing of Penni Zola and Ralph Zola.

OPINION

Stephanie Zola and Gregory Zola

It is my opinion that the presumed known standard signatures of Stephanie Zola and Gregory Zola on their Registration Application forms were signed by the same individual. This finding brings into question the validity of both their signatures on their respective forms. Stephanie Zola's and Gregory Zola's Registration Application signatures were signed September 15th and 16th, 1995 respectively, but were witnessed by Ilan Plawker prior to those dates, on August 2, 1995.

[p. 2] The signatures of Gregory Zola on the Signature Comparison Record are significantly different from his signature on the Registration Application and were in my opinion written by different people.

The signatures of Stephanie Zola on the Registration Application, Certificate and Ballot Application were written by the same person as was the signature of Gregory Zola on the Registration Application. The validity of Stephanie Zola's signatures on the Certificate and Ballot Application remains in question, however. It is my opinion that Penni Zola not only wrote the printing and numbers on Stephanie's and Gregory's Registration Applications, numbers 1 though 6, as admitted, but also wrote the printing and numbers on Stephanie's Certificate and Ballot Application. In addition, there are similarities between Penni Zola's signatures/writing and the Stephanie Zola signatures which suggest that Penni Zola may have signed these as well.

Anna Clemente, Maddalena Clemente, Vinny Clemente, Donato Clemente

It is my opinion that the Certificate signatures of Maddalena Clemente and Anna Clemente were written by the same person, that they are both significantly different from their Board of Election signature or signatures, and that they are not genuine.

Donato Clemente's Certificate signature is significantly different from his Board of Elections signatures and is not genuine. Donato Clemente's signature on the Ballot Application is genuine and also significantly different from his signature on the Certificate.

I question the validity of Vinny Clemente's Certificate signature based on the dynamics of the signature and my finding that the printing on the Certificate was executed by the same person who filled out other Clemente family certificates in which the signatures were found to be not genuine.

My opinion is based on comparison of signatures and writing on the Certificates, Ballot Applications and Board of Election Records of the four Clemente family members.

Other Signatories

I determined that several other signatures on Certificates are genuine.

/s/ Patricia Siegel
Patricia Siegel
Handwriting Examiner